No. 21109

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WENATCHEE THRIFTY DRUGS, INC., RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

Respondent, in its brief, does not dispute the Board's statutory jurisdiction over its retail drug business. For reasons pointed out in our opening brief, this virtually eliminates the need for further judicial inquiry into the issue of jurisdiction. As this Court has acknowledged repeatedly, once it is established that the Board has acted within its constitutional and statutory power, "it is not for the courts to say when that power should be exercised." *N.L.R.B.* v. *Townsend*, 185 F. 2d 378, 383 (C.A. 9),

cert. denied, 341 U.S. 909; and see additional cases cited at pp. 9-11 of the Board's opening brief.

Notwithstanding its failure to contest the Board's statutory jurisdiction, respondent, in its brief (pp. 7-12), proceeds with an effort to show that the Board has abused its discretion in asserting jurisdiction in this case. Respondent's general line of argument, we believe, has been adequately dealt with in the Board's opening brief. We wish here merely to comment on the cases principally relied on by respondent. Each of the cases to which respondent refers is factually distinguishable from the one at bar, and in no instance is any circumstance revealed which would provide a basis for the conclusion that the Board has improperly exercised its discretion by asserting jurisdiction in the instant case.

Electronic Circuits, Inc., 115 NLRB 940, relied on by respondent (br. p. 10) is distinguishable from the case at bar, in that there were compelling factors in that case pointing to the separateness of the enterprises. The employer's operations and policies were under the exclusive direction and control of its president, rather than of the Richardson Company, which concededly owned a majority of the employer's stock. Further, the employer's president was not affiliated with the Richardson firm, as such; there was no exchange of personnel between the two firms; and the services performed by the employer for Richardson comprised only a small portion of the employer's business. Further, the services provided by the employer for Richardson were performed in the same manner for several other companies.

In *American Furniture Co., Inc.*, 116 NLRB 1496, the indicator of an integrated enterprise was common ownership, there consisting of majority ownership of three firms by one family. However, there was no interchange of employees, and the operational policies for each store were independently formulated by the three individual general managers. The Board concluded in that case that there was insufficient evidence that the three separate corporate entities constituted "a single integrated enterprise with centralized management and central control over labor relations policies." 116 NLRB at 497.

Woodstock Manufacturing Co., 116 NLRB 389, unlike the case at bar, was a proceeding where the issue was the appropriateness of a single bargaining unit. In holding that the employees of the two companies involved did not constitute a singe appropriate unit, the Board relied on the fact that there was no interchange of employees, and that the firms had different presidents, each of whom had complete freedom in formulating policy and running his plant.

In *Park Plaza Amusement Co.*, 124 NLRB 428, as in the present case, two companies had the same president and certain officers in common. There was no employee interchange, however, and no common labor policy or benefits. Further, the employer's manager was completely free from control by the other company, and unlike the instant case, he was free to determine all of his own labor policies.

Respondent's reliance (br. p. 11) on *J. G. Roy & Sons* v. *N.L.R.B.*, 251 F. 2d 771 (C.A. 1), and *Miami*

Newspaper Pressmen's Local No. 46 v. *N.L.R.B.*, 322 F. 2d 405 (C.A. D.C.), is misplaced. Unlike the case at bar, those cases involved alleged secondary boycott activity, and the question before the court in each instance was whether a particular employer was a "neutral," and thus an innocent third party in a labor dispute between a union and another company, or whether the two companies fell within the Board's "ally" doctrine, thereby taking the union's activity outside the proscription of the Act. Aside from the fact that those cases arose under a different provision of the Act than the one involved here, to the extent that they are analogous, we submit that they are distinguishable from the one before the Court. Each of those cases presented situations where, despite common ownership of two firms, labor relations policies were independently formulated. This is in sharp contrast to the instant case, where, as respondent concedes, Clarence Olberg, the president and a principal owner of Thrifty Investment, is drawn into respondent's labor policy on any occasion "when a controversy arises" (Resp. br. p. 3). Moreover, in neither of the two foregoing cases relied on by respondent was there the degree of employee interchange that is present here. In the *Roy* case there was no transfer of personnel from one firm to the other (251 F. 2d at 773), and in the *Miami Pressmen's* case of a total of 2500 employees, only two individuals were shown to have worked for both companies (322 F. 2d at 407). In the case at bar, on the other hand, the record shows that there was frequent interchange of employ-

ees among the several stores in the chain. (See p. 5 of Board's opening brief.)

CONCLUSION

For the reasons stated here and in our main brief, we respectfully submit that a decree should issue enforcing the Board's order in full.

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December 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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